

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRIAN L. CULLY

Claimant

VS.

EARTHGRAINS/SARA LEE BAKERY GROUP

Respondent

AND

**INDEMNITY INSURANCE COMPANY OF
NORTH AMERICA**

Insurance Carrier

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Docket No. 1,020,951

ORDER

This matter is before the Workers Compensation Board (Board) on remand from the Kansas Court of Appeals from its January 11, 2008 unpublished Memorandum Opinion in No. 97,311. The matter was originally decided by the Board in its Order dated August 25, 2006. The Court of Appeals acknowledged that the Board, in its decision, awarded claimant a 19 percent permanent partial disability of the body as a whole. However, after the Board rendered its decision, but before the Court of Appeals issued its Memorandum Opinion, the Kansas Supreme Court issued its decision in *Casco*.¹ The matter was remanded to the Board for a determination of claimant's entitlement to an award consistent with the ruling set forth in *Casco*.

Claimant appeared by his attorney, John L. Carmichael of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Douglas C. Hobbs of Wichita, Kansas.

The Board has considered the record and adopts the stipulations as set forth in its Order of August 25, 2006.

¹ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (May 8, 2007).

ISSUES

What is the nature and extent of claimant's injuries and disability? In applying the analysis set forth in *Casco*, the Court of Appeals, in its Memorandum Opinion of January 11, 2008, determined that claimant was not permanently and totally disabled, as respondent had overcome the presumption set forth in K.S.A. 44-510c. The Court noted that claimant had returned to work for respondent, earning more money and receiving the same benefits as he was receiving at the time of the injury. The matter was remanded to the Board with instructions to determine, pursuant to *Casco*, the nature and extent of claimant's disability to his lower extremities from the injuries suffered through his last day worked with respondent, December 3, 2004.

FINDINGS OF FACT

Claimant began working in respondent's bakery in Hutchinson, Kansas, in 1984. At the time of claimant's hire, he had a history of left knee injuries, having undergone an open meniscectomy in 1971. Claimant recovered from that surgery and was asymptomatic at the time of his hire with respondent.

Claimant's job with respondent required he be on his feet all day, working on concrete floors. Claimant suffered a work-related left knee injury on February 26, 2004, when he twisted while shoving a rack. Claimant was provided medical treatment, eventually coming under the care of board certified orthopedic surgeon Kenneth A. Jansson, M.D. Dr. Jansson performed surgery on claimant's left knee on April 20, 2004, performing a diagnostic arthroplasty of the left knee; partial medial meniscectomy; chondroplasty of the lateral femoral condyle, medial femoral condyle, trochlea and patella; abrasion arthroplasty of the medial tibial plateau; and debridement of an anterior cruciate ligament (ACL) cyst. Dr. Jansson testified that basically, claimant had a lot of degenerative changes in the knee, with arthritis by the patella, and a little medial meniscus tear, with an ACL cyst. Dr. Jansson found no evidence of a fresh traumatic injury. He assessed claimant a 2 percent functional impairment to the left knee pursuant to the fourth edition of the *AMA Guides*² and released claimant to return to work on June 9, 2004, without restrictions.

Dr. Jansson had treated claimant in 2000 for an injury to his right knee. On May 9, 2000, he performed an arthroscopy on the right knee, repairing a torn medial meniscus.

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Dr. Jansson rated claimant's right knee at that time at 5 percent to the right lower extremity pursuant to the fourth edition of the *AMA Guides*.³

After the April 2004 surgery, claimant used crutches for two or three days. He wore a brace on his left knee until June 9, 2004. This brace was uncomfortable and made his already weaker right knee his dominant knee. Claimant was released to return to his regular work duties on June 9, 2004. Claimant testified that after the February 26, 2004 left knee injury, his right knee began to hurt more due to the need to use it for the "brunt" of claimant's walking, standing and moving around.

Claimant continued to perform his regular work duties until the respondent's bakery closed on December 3, 2004. During this time, claimant's condition in his right knee grew worse. Claimant was off work for approximately one week. He then began working in respondent's bakery in Wichita, Kansas. Claimant is currently earning more money per week at the Wichita bakery than he earned for respondent in Hutchinson.

Claimant was referred to board certified rehabilitation and physical medicine specialist Pedro A. Murati, M.D., by his attorney for an examination on January 17, 2005. This was not the first time Dr. Murati examined claimant, having seen him in 2001 as a result of the 2000 injury to his right knee. Dr. Murati assessed claimant a 20 percent functional impairment to the right knee at that time, pursuant to the fourth edition of the *AMA Guides*.⁴

When Dr. Murati examined claimant on January 17, 2005, he diagnosed claimant as being post left knee partial medial meniscectomy, with chondroplasty of the lateral femoral condyle, medial femoral condyle, trochlea, and patella; abrasion arthroplasty of the medial tibial plateau, and debridement of an ACL cyst; and bilateral patellofemoral syndrome, preexisting on the right.

Dr. Murati rated claimant at 41 percent to the left lower extremity, after deducting 5 percent for the patellofemoral syndrome. He also rated claimant at 20 percent total impairment to the right lower extremity, after deducting 8 percent preexisting. Dr. Murati testified that after injuring his left knee, claimant aggravated his preexisting problem on the right knee. He also diagnosed claimant with flexion contractures of both knees, which will lead to overuse injuries of the knees. He testified that claimant's work on concrete at least 8 hours a day would permanently accelerate the development of arthritic changes in claimant's knees.

³ *AMA Guides* (4th ed.).

⁴ *AMA Guides* (4th ed.).

Claimant was referred by the ALJ to board certified orthopedic surgeon C. Reiff Brown, M.D., for an independent medical examination on September 14, 2005. Dr. Brown found claimant to have preexisting patellofemoral syndrome, resulting in progressive chondromalacia of the patellas. He also diagnosed preexisting medial meniscus removal which resulted in progressive deterioration of the left knee, particularly the medial compartment. He noted that these bilateral preexisting conditions have, over the years, been aggravated by claimant's work activities. The incident on February 26, 2004, markedly aggravated the left knee, which then secondarily aggravated the right knee due to the extra stress placed on the right knee. He found claimant to be at maximum medical improvement, but cautioned that claimant would, at some point in the future, require a total knee joint replacement. Dr. Brown rated claimant at 2 percent of the left lower extremity for his partial medial meniscectomy, citing Table 64, page 85. (The report of Dr. Brown does not specify in which publication the cited tables and pages originate. However, the fourth edition of the *AMA Guides*⁵ coincides with the tables and pages noted by Dr. Brown in his September 14, 2005 report. Additionally, neither party objected to the use of Dr. Brown's ratings.) Claimant was assessed an additional 25 percent of the left lower extremity on the basis of his 1-millimeter joint line space as noted in Table 62 on Page 83. Claimant was given an additional 10 percent impairment of the left lower extremity for his patellar joint line of 2 millimeters, based on the same table. These combine for a 34 percent permanent partial impairment of the left lower extremity. Claimant was given a 7 percent impairment of the right lower extremity for the medial joint line narrowing per Table 62 and 10 percent of the right lower extremity for the 2-millimeter joint line with the patellofemoral joint. These combine for a 16 percent permanent partial impairment of the right lower extremity.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁶

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁷

⁵ *AMA Guides* (4th ed.).

⁶ K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

⁷ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁸

If the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in any type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability.⁹

Although both K.S.A. 44-510d and K.S.A. 44-510e apply to permanent partial disability, eyes, hands, arms, feet and legs are all included in the schedule contained in K.S.A. 44-510d. Therefore, claimant's compensation must be calculated in accordance with the schedule contained in K.S.A. 44-510d.

Previously, the Board found the opinion of the independent medical examiner, Dr. Brown, to be the most credible with regard to claimant's overall permanent impairment. Therefore, claimant is awarded a 34 percent permanent partial disability of the left lower extremity on a functional basis and a 16 percent permanent partial disability of the right lower extremity on a functional basis.

CONCLUSIONS

Claimant has suffered a 34 percent permanent partial disability to the left lower extremity and a 16 percent permanent partial disability of the right lower extremity for the injuries suffered both on February 26, 2004, and through claimant's last day with respondent, December 3, 2004.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated April 12, 2006, should be, and is hereby, modified to award claimant a 34 percent permanent partial disability on a functional basis for the injuries suffered to claimant's left lower extremity, and a 16 percent permanent partial disability on a functional basis for the injuries suffered to claimant's right lower extremity.

⁸ K.S.A. 44-501(a).

⁹ *Casco*, *supra*, at 528.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Brian L. Cully, and against the respondent, Earthgrains/Sara Lee Bakery Group, and its insurance carrier, Indemnity Insurance Company of North America, for an accidental injury which occurred through December 3, 2004, and based upon an average weekly wage of \$683.60, for 68 weeks permanent partial disability compensation at the rate of \$449.00 per week totaling \$30,532.00 for a 34 percent disability to the left lower extremity, and 32 weeks permanent partial disability compensation at the rate of \$449.00 per week totaling \$14,368.00 for a 16 percent disability to the right lower extremity, making a total award of \$44,900.00, all of which is due and owing and ordered paid in one lump sum, minus any amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of April, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge